



April 4, 2013

via electronic mail rfs@mail.house.gov

The Hon. Fred Upton, Chairman
Energy & Commerce Committee
U.S. House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515

The Hon. Henry Waxman, Ranking Member
Energy & Commerce Committee
U.S. House of Representatives
2204 Rayburn House Office Building
Washington, DC 20515

re: White Paper on RFS – Questions for Stakeholder Comment

Dear Chairman Upton and Ranking Member Waxman,

I am pleased to take this opportunity to introduce our industry to the committee and to provide comments in response to your request for stakeholder input on the current and future state of the Renewable Fuel Standard.

The Outdoor Power Equipment Institute (OPEI) is the major international trade association representing the manufacturers and their suppliers of small off-road engines and consumer and commercial outdoor power equipment. These products are commonly found in most American households and include products such as lawnmowers, garden tractors, utility vehicles, trimmers, edgers, chain saws, snow throwers, tillers, leaf blowers and other lawn and garden implements. While small engines and outdoor power equipment consume a small percentage of the nation's fuel supply, their ownership by the American consumer is ubiquitous. Many of these products have long service lives, exceeding a decade; as a result, there exists an inventory of as many as 200 million legacy products currently in use.

Our members understand and appreciate the work Congress has done on energy independence, reducing demand on foreign sources of oil while increasing the use of cleaner biofuels. Our members offer a full range of products powered by different sources or fuels including battery, electric, propane, CNG, diesel and gasoline electric hybrids, solar and biodiesel, as well as gasoline with 0 to 10 percent ethanol.

I. Overview

Increasing the use and range of biofuels – and, in particular, the use of mid-level ethanol blended fuels in the general purpose market – presents enormous challenges to manufacturers and users alike. No engine products in our legacy portfolio or coming off the production lines today are designed, built or warranted to run on any gasoline fuel containing more than 10 percent ethanol. For these legacy and currently-produced products, there needs to be the continued availability of fuels with 10 percent or lower ethanol content.

The members of OPEI are not anti-ethanol. They may ultimately be able to design new products to run on mid-level ethanol fuel, given adequate lead time and assurance that the fuels being used in these products

are within a limited, acceptable range, and that these fuels are reflective of the certification fuel specified by EPA for emissions compliance.

Even with future product designs, our industry faces unresolved challenges. The relatively inexpensive engines used to power these products must continue to rely on carburetors rather than fuel injection; as a result, the engines can only operate properly within a narrow band of varying ethanol content. For example, air-fuel ratios on current carburetors are set for fuels that contain between E-0 and E-10. Manufacturers commonly certify their engines to the U.S. EPA emission standards based on EPA emission testing with E-0. If the current and legacy engines set for E-0 fuels were run on E-15, there would be operational and heat related problems because the higher oxygen content of the E-15 fuels would result in excessive “enleanment” (i.e., too much oxygen relative to the concentration of fuel.) We have provided some of the materials previously provided to Congress and EPA as attachments to these comments.

OPEI members are working individually through their dealer and service networks to educate consumers about the risks associated with the use of E-15 in their products. Additionally, companies have introduced on-product labeling and updated warranty conditions. The OPEI is currently engaged in an educational campaign, mainly through print media, to warn consumers. The standard ad is included as an attachment to this letter.

The OPEI has provided testimony and exhibits to both chambers of Congress over the past several years, raising concerns with the RFS, the E-15 partial waiver, and the EPA’s Misfueling Mitigation Plan (MMP) program. We have also been a pro-active partner with EPA in trying to improve EPA’s labels and MMPs to protect consumers.

II. Response to Questions

The OPEI comments below are in response to Questions 2), 3), 7), and 8) from the committee’s circulated request, as those questions are the most relevant to our unique concerns.

2) What are the benefits and risks of expanded use of E-15 to automakers, other gasoline powered equipment makers, refiners, fuel retailers, and others involved in the manufacture and sale of gasoline and gasoline-using equipment?

There are no benefits of expanded use of E-15 for “gasoline powered equipment makers,” as the sale of E-15 for use in these products, both new and legacy, is illegal under the conditions of the partial waiver granted for E-15.

The presence of E-15 in the marketplace without adequate labels and misfueling mitigation controls unfairly puts manufacturers at risk of substantial warranty claims for illegal acts (beyond the manufacturer’s control) of misfueling, particularly as E-15 becomes more prevalent in the marketplace. When consumer products are damaged, it harms the long-established relationships between our member manufacturers and their customers as well as their well-deserved brand recognition. The risks to manufacturers of small off-road engines and outdoor power equipment include potential exposure to alleged claims for personal injury, CPSC or EPA product-recalls and product-damage, resulting from unavoidable misfueling.

3) What are the risks of the introduction and sale of E-15 to the owners of pre-2001 motor vehicles, boats, motorcycles, and other gasoline-powered equipment not approved to use it?

The risks to consumers with the use of E-15 in “other gasoline-powered equipment” are two-fold – damage to their engines and equipment and personal injury.

The use of E-15 in non-approved engines introduces 2-3% additional oxygen into the fuel mix, which produces a significant increase in engine temperature. This added heat results in increased engine wear and engine failure. Additionally, the higher level of ethanol increases the solvent effect of the fuel, corrosive to both metallic and elastomeric components within the engine. This again leads to reduced short-term performance and ultimately engine failure, as well as potential fuel leaks from the deformed rubber and plastic components. The illegal use of E-15 in these products poses a significant risk of economic loss to American consumers, particularly when their products are damaged and they have violated the terms of their warranties which prohibit the use of fuels with an ethanol content greater than 10 percent.

While the risk of lost property is important, more critical are the personal injury risks posed by the performance and service life impacts of E-15 in outdoor power equipment. The most acute is the heightened risk of burns from over-heated engines and exhaust components, and a possible increase in the risk of engine fires due to fuel leaks from damaged components. For example, many handheld products such as trimmers, chain saws, or blowers are held close to the body or in the case of blowers worn on the back; as such, these operating positions require safe operating temperatures. Additionally, there are also added risks to operators of wheeled products, if rendered immobile in remote areas due to engine failure.

7) Is E-15 misfueling unavoidable? Are there lessons from the labeling and dispensing of diesel, E-85 and other fuels that prevent their misfueling that can also be applied to E-15?

Unfortunately, the RFS and EPA’s partial waiver have resulted in a bifurcated fuels market where there is a growing proliferation of different “general purpose” fuels sold in the marketplace. Blender pumps have further complicated this situation given that consumers can self-select fuels that contain between E-0 and E-85 without meaningful enforcement of the misfueling regulations.

The introduction of E-85 and cleaner diesel fuels did not result in the same serious problems and risks of product damage and personal injury as posed under the current bifurcation of the general fuel supply through the partial waiver for E-15. Prior to approval of the partial waiver for E-15, fuel in the market (E-0 to E-10) was certified and approved for general use in all model year automobiles and small off-road engines. This provided clarity for consumers at the pump when purchasing fuel for their engine-powered products.

The prior introduction of unleaded fuel into the marketplace offers the most instructive example of the challenges with E-15 misfueling and related “lessons learned.” First, during the transfer to unleaded fuels, EPA recognized that at gasoline stations that only sold leaded fuels, there would be 100% misfueling of leaded fuels that would damage the emission controls and catalysts on the new motor vehicles. Accordingly, EPA required gasoline retailers to make the new unleaded fuels available at a threshold number of gasoline stations. (Ultimately, the Courts upheld EPA’s rulemaking and noted that given the enormous stakes of damage to vehicles and their emission controls, EPA “need not gamble” that the fuel market would supply quantities of unleaded gasoline.¹) In this vein, OPEI, along with 11 other associations representing consumer groups and manufacturers, filed a petition for rulemaking to EPA on March 23, 2011, requesting EPA to require the continued availability of fuels with ethanol content of 10 percent or less. EPA denied that petition.

¹ See *Amoco v. EPA*, 501 F.2d 722, 744 (DC Cir. 1974)

Second, as part of the introduction of unleaded fuels, EPA made numerous ongoing improvements to its misfueling regulations to respond to new information and public comments, as well as to EPA's own ongoing misfueling studies. For example, in 1982, ten years after the initial lead phase-out, EPA concluded that 13.5% of vehicles designed for unleaded fuel were being misfueled with leaded fuels.² This misfueling rate was even higher before EPA undertook additional actions to: increase EPA's "vigorous enforcement of the misfueling regulations; implement a broad consumer outreach campaign; and implement robust misfueling controls (like fuel inlet restrictions)."³

In contrast, with the introduction of E-15 under the partial waiver, EPA has failed to exercise similar oversight, misfueling controls, outreach or enforcement – or to respond to new information that documents related problems and the need for corresponding improvements. E-15 misfueling under the current regime is unavoidable as a result of the partial waiver granted for E-15 and the inadequacies of EPA's misfueling mitigation program.

8) Is the existing EPA waiver process sufficient to address any concerns? Should any changes include liability relief or additional consumer protections for addressing misfueling concerns?

Congress strengthened the fuel waiver process in amendments adopted in 2007 to ensure that the introduction of mid-level ethanol fuels did not cause or contribute to any "emission-related" failures of any on-road or non-road vehicles or engines. We respectfully believe that EPA has circumvented Congressional intent by issuing a "partial waiver" that bifurcates the fuel market. As noted by Judge Kavanaugh on the US Court of Appeals of the DC Circuit:

EPA concedes that E-15 likely will contribute to the failure of emission control systems... EPA's E-15 waiver thus plainly runs afoul of the statutory text.⁴

EPA's partial waiver was based on what has been proven to be a flawed assumption that EPA's weak and ineffective misfueling controls would somehow prevent "any emission failures" in the 200 million non-road products that EPA admits would be damaged through such misfueling. EPA should carry the legal burden to first document misfueling controls are effective before they can rely on such controls to prevent emission related failures. The current documented record indicates that there is, and will be, a high rate of misfueling and that the current misfueling controls are inadequate and need to be dramatically strengthened and improved.

In order to mitigate the concerns described herein, Congress should direct EPA to initiate a new rulemaking, with a notice and comment process, to address the significant, unresolved problems related to E-15 misfueling. This new rulemaking would allow EPA to make better informed decisions and adopt needed improvements that respond to the new information that has become available since the EPA comment period closed two years ago on EPA's proposed misfueling regulations.

EPA should go through this transparent notice and comment rulemaking process – rather than the current ad hoc process where EPA unilaterally approves alternative MMP-modifications and thereby changes the established misfueling regulations and labels. As part of this new rulemaking, EPA should establish uniform color and content requirements for all misfueling labels, including those labels that re-direct consumers away from blender pumps and toward a dedicated E-10 pump. EPA should consider and respond to the numerous misfueling suggestions OPEI and other stakeholders have submitted to EPA. For example, OPEI proposed a much stronger warning label which relied on generic symbols (red/circle) for

² See 49 Fed. Reg. 31032, 31034 (Aug. 2, 1984)

³ Id at 31035

⁴ See Grocery Manufacturers Association v. EPA, 693 F.3d 169 (DC Cir. 2012) – Justice Kavanaugh's dissent.

the typical non-road products and portable fuel containers that cannot use E-15 as well as a mandatory action symbol. These improved labels would be more effective and would be understood by large segments of the population that cannot read English.

Virtually all the gasoline retailers that currently sell E-15 fuels are relying on “blender pumps” that distribute a wide range of fuels with different ethanol concentrations from the same hose and nozzle. There should be a clear ban on the sale or distribution from a “blender pump” of \geq E-10 to non-road products or portable gasoline containers because of the residual concentrations of E-15 fuels in the mixed-fuel hoses.

* * *

The basis for most of the aforementioned concerns is the legal and practical deficiencies of the EPA waiver process. The introduction of E-15 into the marketplace, as accommodated by the partial waiver, has created the unworkable scenario that manufacturers and consumers of outdoor power equipment find themselves in today. Congress should direct EPA to implement a broad consumer campaign with stakeholder input to help consumers select the correct fuel to avoid damages from misfueling. Congress should also direct EPA to ensure the long-term availability of fuels with ethanol content of 10 percent or below.

OPEI members are interested in ideas aimed at both liability relief and consumer protections in the face of unavoidable misfueling under the current MMPs.

We appreciate the opportunity to provide comments to the committee.

Best regards,



Kris Kiser
President & CEO
kkiser@opei.org

cc: Members of the House Committee on Energy & Commerce

attachments: 1. OPEI letter to EPA, April 18, 2012
 2. coalition letter to EPA, March 23, 2011
 3. OPEI misfueling ad



GlobalAutomakers 



April 18, 2012

Via E-Mail & Regular Mail

Ms. Margo T. Oge
Director
Office of Transportation and Air Quality
US Environmental Protection Agency
1200 Pennsylvania Avenue NW
Mail Code 6401A
Washington, DC 20460

RE: EPA Approval of the Renewable Fuel Association's Misfueling Mitigation Plan

Dear Ms. Oge,

The Alliance of Automobile Manufacturers (Alliance), the Association of Global Automakers, Inc. (Global Automakers), the National Marine Manufacturers Association (NMMA) and the Outdoor Power Equipment Institute (OPEI) continue to be concerned about the significant likelihood of misfueling resulting from the introduction of E15 into the marketplace and the likelihood for engine and vehicle damage and/or higher emissions as a result of use within products not designed for such a fuel.¹ We were therefore surprised to discover that on March 15, 2012, EPA abruptly and prematurely approved via letter the Renewable Fuel Association's (RFA) E15 Misfueling Mitigation Plan (MMP), which was just submitted to EPA on March 2, 2012. We understand that under the requirements of EPA's partial waivers that allow gasoline-ethanol blends up to 15 percent (E15), a company must provide an MMP as part of its approval process to supply such fuel. We have several concerns related to the approved MMP.

EPA's statutory findings under the Clean Air Act underlying both of the E15 waivers are expressly conditioned on the basis that the distribution and retail sale of E15 would occur only pursuant to effective terms and conditions in an EPA-approved MMP.

¹ As you know, the Alliance and Global Automakers have expressed grave concerns about the introduction of E15 in vehicles for which EPA has *approved* its use in the 211(f) waivers it has granted, because the vast majority of such vehicles were not originally designed to accommodate E15. While such concerns persist, for purposes of this letter we only address the issue of E15 "misfueling" as EPA would define it, i.e., the introduction of E15 into vehicles and engines for which EPA has *not* approved its use.

I. EPA Must Provide Notice and Comment on Proposed MMP

We appreciate the pledge made by Administrator Jackson that “EPA promises to provide for the fullest possible public participation in decision-making. This requires not only that EPA remain open and accessible to those representing all points of view, but also those EPA offices responsible for decisions take affirmative steps to solicit the views of those who will be affected by these decisions...”

The RFA MMP will impact numerous critical stakeholders who were denied any opportunity to comment on the MMP – including millions of consumers, tens of thousands of gasoline retailers and fuel distributors, and the hundreds of manufacturers that produce the affected engines, vehicles, and boats. In fact, over the next five years, tens of thousands of gasoline retailers may sell millions of gallons of E15 pursuant to the terms and conditions in EPA’s approved MMP. The effectiveness of the terms and conditions in RFA’s MMP will therefore largely determine whether millions of boats, non-road equipment and older model year vehicles are damaged, or otherwise have “emission failures,” due to misfueling in violation of the Clean Air Act.

Given its prescriptive nature, national applicability and the dramatic impacts and consequences of RFA’s MMP, EPA is legally obligated to go through a notice and comment procedure under the Administrative Procedures Act (“APA”) before it can approve any MMP. The MMP has all the attributes of a rule that is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”² This case is no different from the nationwide permit at issue in *National Association of Home Builders v. US Army Corps of Engineers*, 417 F. 3d 1272, 1279 (DC Cir. 2005). In that case, Court of Appeals for the District of Columbia held that the subject permits, like the approved MMP, “create legal rights and impose binding obligations in so far as they effectively authorize” certain activities, and prohibit other activities “without any detailed, project-specific review.”³

II. The MMP Technical Deficiencies Must Be Corrected

RFA’s MMP adds no value, but merely incorporates the generic provisions in the EPA Misfueling Regulations without providing any additional details on how the plan will actually be implemented in an effective manner. Accordingly, as part of the required notice and comment process, EPA should specifically request data and inputs on numerous issues including the following unresolved and problematic issues in RFA’s MMP.

- **Outreach to Consumers:** We believe there needs to be much greater specificity in any MMP on how consumers will be effectively and broadly informed through a national campaign about the potential adverse effects of misfueling and how to select the right fuel for the various categories of non-road and on-road products.
- **Blender Pumps:** Since the MMP only incorporates the generic provisions in EPA’s rule, it fails to address one of the biggest unknowns in the field, blender pumps, which allow the user to select a blend level of ethanol in gasoline; the labeling provision in the MMP is

² 5 U.S.C § 551(4).

³ *Id.* at 1279-80.

totally inadequate for addressing them. In its comments on the misfueling NPRM, NMMA "strongly discourag[ed] any attempt to mingle blender pumps with regular fuel dispensers, as this will substantially contribute to consumer confusion and contribute to widespread inadvertent misfueling."⁴

Under current regulations and requirements, several states allow the use of blender pumps although such use is restricted to flexible fuel vehicles for any gasoline-ethanol blend above 10 percent. We are concerned that once E15 fuel is approved for sale, blender pumps will become more widespread as convenient and existing technology for distributing E15 fuel; the use of blender pumps is further encouraged under a grant available from the U.S. Department of Agriculture. In order for any company to seek approval to use this MMP, we believe that it must provide additional information about the labeling and treatment of blender pumps, especially if its fuel will be sold in states where blender pumps are or will be located.

- Compliance Surveys: There are no measures in the MMP's compliance survey to quantify or evaluate acts of illegally misfueling portable fuel containers and non-road products at gasoline retailers. The MMP's compliance survey program must be expanded to include a review of whether misfueling is occurring and at what estimated rates. Under the MMP, there should be a requirement to broadly monitor individual gasoline stations to check the rate of misfueling, accuracy of the ethanol content, fuel quality (including compliance with all the specifications), RVP⁵ and label accuracy. This program should include a review of the warning labels used at gasoline retailers and testing of ethanol content and RVP at fuel pumps dispensing blends greater than E10. If the Compliance Surveys or other information indicate there are misfueling problems in the field, then other more responsive control measures should be adopted in the MMP.

In addition, in the comments submitted by Global Automakers, formerly the Association of International Automobile Manufacturers, for the public record on the E15 partial waivers,⁶ it was noted that while pump labeling is a necessary step to address misfueling, it is insufficient alone to adequately address the potential for misfueling:

In order to reduce the likelihood of misfueling, there are several components of a comprehensive fuel labeling program that the proposed rule should encompass...all pumps – not just E15 pumps – should be labeled. E0 and E10 pumps should be labeled, and fuel pumps for flexible fuel vehicles (from E16 to E85), including blender pumps, should be labeled.⁷

⁴ See the comments of National Marine Manufacturers Association on the U.S. Environmental Protection Agency's Notice of Proposed Rulemaking, Regulation to Mitigate the Misfueling of Vehicles and Engines with Gasoline Containing Greater than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs, January 3, 2011 at page 6.

⁵ Reid Vapor Pressure (RVP) is the measurement of how volatile gasoline is.

⁶ See the comments of the Association of International Automobile Manufacturers on the U.S. Environmental Protection Agency's Notice of Proposed Rulemaking, Regulation to Mitigate the Misfueling of Vehicles and Engines with Gasoline Containing Greater than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs, January 3, 2011 at pages 6-7.

⁷ *Id.* at pages 7-8.

See also NMMA comments seeking "robust labeling for all blender pumps advising consumers that a 10% maximum is allowable for marine applications."⁸

In short, the MMP fails to address many critical issues essential to a robust misfueling program. We believe that under the approved MMP, it is virtually certain that there would be a high incidence of misfueling from the introduction of E15 into the marketplace, resulting in vehicle and engine damage as well as higher emissions. In order to limit misfueling to the greatest extent possible, it will be necessary for MMPs to go beyond minimum requirements and for all stakeholders to have an opportunity to consider the impacts of any such MMPs.

In light of these concerns and deficiencies, we request that EPA withdraw its approval of the MMP and circulate it for public notice and comment. Thank you for your consideration. If you have any questions or wish to discuss this matter, please contact the undersigned.

Sincerely,



Julie C. Becker
Vice President, Environmental Affairs
202-326-5511

Signed on behalf of:
John Cabaniss (Global Automakers) 202-650-5562
Kris Kiser (OPEI) 703-549-7600
Cindy Squires (NMMA) 202-737-9766

cc: Byron Bunker

⁸ See the comments of National Marine Manufacturers Association on the U.S. Environmental Protection Agency's Notice of Proposed Rulemaking, Regulation to Mitigate the Misfueling of Vehicles and Engines with Gasoline Containing Greater than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs, January 3, 2011 at page 6.

American Motorcyclist Association
Association of Global Automakers
Association of Marina Industries
BoatUS
International Snowmobile Manufacturers Association
Motorcycle Industry Council
National Boating Federation
National Marine Manufacturers Association
Outdoor Power Equipment Institute
Personal Watercraft Industry Association
Recreational Off-Highway Vehicle Association
Specialty Vehicle Institute of America

March 23, 2011

The Honorable Lisa P. Jackson
Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW Mail Code 1101A
Washington, D.C. 20460

Re: Petition for Rulemaking Under the Clean Air Act to Require the Continued Availability of Gasoline Blends of Less Than or Equal to 10% Ethanol

Dear Administrator Jackson,

Pursuant to the Administrative Procedure Act (“APA”) and the Clean Air Act (“CAA”), manufacturers of motor-vehicles, boats, marine engines, motorcycles, and lawn and garden equipment, as well as organizations that represent the consumers that own and operate these products, hereby petition the Administrator of the United States Environmental Protection Agency (“EPA”) to promulgate a regulation requiring gasoline retailers to continue to make available gasoline blends of no greater than 10% ethanol (“≤E-10 fuel”). This affirmative marketing requirement is necessary to ensure that there will be no damage to (or impairment of) the emissions-related components on nonroad products and older model year motor vehicles – which were explicitly excluded from EPA’s “partial waivers” allowing the conditional use of blends up to fifteen percent ethanol (“E-15”) exclusively in newer model year motor vehicles.¹ EPA limited the scope of these waiver decisions because of the well-documented, emission-related problems that misfueling with E-15 could cause to at least all nonroad products and older

¹ 75 Fed. Reg. 60894 (Nov. 4, 2010); 76 Fed. Reg. 4662 (Jan. 26, 2011)

model year motor vehicles. EPA has clear authority to adopt such affirmative fuel marketing requirements under Section 211(c) of the Clean Air Act.

I. There Will be a 100% Misfueling Rate of Nonroad Products and Older Model Year Motor Vehicles at Gasoline Stations that Only Offer E-15

EPA has issued two partial waivers allowing the use of E-15 in 2007 and newer model year vehicles and 2001-2006 model year vehicles, respectively. However, EPA denied a waiver for several other categories of vehicles and equipment, including: nonroad engines, vehicles, boats, and equipment; 2000 and earlier model year motor vehicles; motorcycles; and heavy duty gasoline vehicles.² EPA denied a waiver for nonroad engines, vehicles, and equipment on the basis that “there are emission related concerns with the use of E-15 in nonroad products, particularly regarding long-term exhaust and evaporative emission (durability) impacts and materials compatibility issues.”³ EPA made nearly identical statements with regard to model year 2000 and older motor vehicles and stated that such concerns also applied to heavy duty gasoline vehicles and engines and highway and off-highway motorcycles.⁴

The waivers covering 2001 and newer on-road motor vehicles included conditions requiring, among other things, mitigation of the potential for misfueling. In addition, EPA proposed a separate misfueling regulation that would supersede the misfueling waiver conditions when promulgated. There, EPA recognized its concerns with misfueling E-15 into nonroad products “include not only the potential for increased exhaust and evaporative emissions but also the potential for engine failures from overheating.”⁵ However, despite EPA’s admission of the potential adverse environmental and economic consequences of misfueling, EPA’s misfueling proposal will not adequately ensure the continued protection of emissions control devices and air quality because it does nothing to ensure that the appropriate fuel is available for purchase for vehicles and equipment not subject to the waivers. Thus, if \leq E-10 fuels are not available (alongside grades up to E-15 at all gasoline stations choosing to provide fuels greater than E-10), consumers will have no choice but to misfuel with E-15.

² Note that nonroad products means those nonroad products that contain spark-ignition engines and are used to power nonroad vehicles and equipment such as boats (including outboard marine engines, and Sterndrive Inboard Engines (SD/I)), Personal Watercraft (PWC), snowmobiles, generators, lawnmowers, forklifts, ATVs, nonroad motorcycles, lawnmowers, trimmers, chainsaws, and many similar products. *See* 75 Fed. Reg. at 68129-37.

³ 75 Fed. Reg. at 68137

⁴ *Id.* at 68129, 68138

⁵ 75 Fed. Reg. 68044, 68046 (November 4, 2010)

Concerns over the availability of ≤E-10 fuel will increase as pre-2000 MY vehicles are replaced, as fuel use for the remaining categories of vehicles and equipment (not subject to a waiver) will constitute a small and declining percentage of the total fuel delivered by any fueling station. This concern is particularly acute given the stringent phase-in of the RFS program. The incentive for fueling stations to maintain a separate tank and pump for vehicles and equipment not subject to a waiver is minimal and would result in higher unit fuel costs to provide sufficient operating margin for the station to offer ≤E-10 fuel. Indeed, many stations may not even have enough tanks to accommodate an additional fuel, leading them to choose between E-15 and ≤E-10 fuels or to install additional tanks for ≤E-10 fuels and pass on those prices to consumers.⁶ These additional costs would provide an additional disincentive for consumers to locate and utilize ≤E-10 fuel. If a retailer opts not to undergo these additional costs, it is reasonable for EPA to presume that a facility will elect to market only E-15, as E-15 is expected to be the cheaper fuel in the marketplace and gasoline retailing is highly price-sensitive.

There is also a strong potential that the reduced volume of ≤E-10 fuel required in the marketplace would result in elimination of supply, further eroding the availability of ≤E-10 fuel. This potential is heightened by the fact that the base fuel utilized for an E-15 blend would not be a legally viable fuel for blending and distribution with lower ethanol concentrations required for nonroad engines and equipment unless EPA also eliminates the 1% RVP waiver for current E-10 fuels as well.

II. EPA Has the Legal Authority to Ensure the Continued Availability of ≤E-10 Fuel

Petitioners urge EPA to adopt additional affirmative marketing requirements to mitigate misfueling to the greatest extent practicable. Under Section 211(c) of the CAA, the Administrator may promulgate controls, including affirmative fuel marketing requirements, “if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use...”⁷ In addition, EPA also enjoys statutory authority to promulgate affirmative marketing requirements under another provision of Section 211(c), which permits the Administrator to control or prohibit fuels “if the emission product of such fuel or fuel additive causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare.”⁸ In its proposed ethanol misfueling control regulations, EPA has already proposed to make the requisite findings related

⁶ See Flexible-Fuel Vehicle and Refueling Infrastructure Requirements Associated with Renewable Fuel Standard (RFS2) Implementation, Conducted for the Renewable Fuels Association (March 2011), available at

http://ethanolrfa.3cdn.net/dc3fb2d776734043df_13m6iiny.pdf

⁷ See CAA Section 211(c)(1)(B)

⁸ See CAA Section 211(c)(1)(A)

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to “health and welfare” and “significant impairment” under both provisions of 211(c)(1) that would support an affirmative marketing requirement. Specifically, EPA concluded that:

Under Section 211(c)(1)(B), we believe that E15 would significantly impair the emission control systems used in MY2000 and older light-duty motor vehicles, heavyduty gasoline engines and vehicles, highway and off-highway motorcycles and all nonroad products... [and] that the likely result would be increased HC, CO, and NOx emissions when these particular engines, vehicles, and nonroad products use E15.⁹

Comments submitted into the dockets on the EPA E-15 partial waiver and the related proposed misfueling controls already include a large volume of specific information submitted by Petitioners that meets both of these statutory prongs. For example, attached please find comments submitted by the AllSAFE coalition, (which includes several of the Petitioners) in the E-15 partial waiver docket.¹⁰ These enclosed comments (as well as the other related comments submitted by the Petitioners) demonstrate that misfueling with E-15 will cause a “substantial impairment of emission control devices” and will “degrade air quality” and thus endanger public health or welfare.

III. Regulatory and Judicial Precedent Supports EPA’s Adopting the Requested Affirmative Marketing Requirements

Because EPA cannot predict with certainty that ≤E-10 fuel will be available for the legacy fleet, Petitioners request that EPA, consistent with prior precedent, promulgate an affirmative marketing requirement that ensures continued consumer choice and effectuates its E-15 waiver conditions and labeling requirements. EPA cannot reasonably rely on the assumption that market forces will ensure the continued availability of ≤E-10 fuel when it has approved a waiver based on conditions relating to misfueling. Rather, it must create legal obligations that ensure that the conditions on which the waivers were based will be fulfilled, and it must do so proactively before emission control devices, air quality, and public health are negatively impacted.

EPA has in the past appropriately used its CAA Section 211(c) authority to “control or prohibit” the sale or offering for sale of fuels to ensure the protection of emission control devices. Specifically, during the transition to unleaded fuels in the 1970s, EPA invoked its Section 211(c) authority to ensure that unleaded fuel was available to consumers in order to prevent the impairment of emission control devices. EPA’s prior experience with fuel transitions and misfueling demonstrates that labeling alone is insufficient to prevent misfueling. EPA’s

⁹ 75 Fed. Reg. 68044, 68081 (Nov. 4, 2010)

¹⁰ See Exhibits A and A-1 (Docket # EPA-HQ-OAR-2009-0211-2559.1)

original unleaded fuel controls in 1974 included three essential components: (1) a warning label; (2) robust misfueling controls (i.e. restricted fuel nozzle diameters); and (3) *the required availability of unleaded fuels at a threshold number of gasoline stations*.¹¹

In developing the misfueling control regulations for unleaded fuels, EPA correctly determined that “without regulatory action requiring retail outlets to market at least one grade of such gasoline, availability of that product to the general public in all areas of the country would be uncertain, and may not be sufficient to ensure the protection of catalytic control devices.”¹² In a series of rulemakings, EPA ultimately required that all urban gasoline retailers that sold more than 200,000 gallons per year and all rural gasoline stations that sold more than 150,000 gallons in any year after 1971 provide at least one pump for unleaded gasoline.¹³ EPA maintained these affirmative marketing obligations throughout the phaseout of lead gasoline until it ultimately determined that availability of unleaded gasoline was so widespread as to make the requirements unnecessary.¹⁴ Notably, when EPA ultimately eliminated the affirmative marketing requirement, it justified it on the basis that it was no longer necessary because more than 90% of purchased fuel was unleaded gasoline, thus creating a readily available commercial market for unleaded gasoline.

The D.C. Circuit upheld the affirmative marketing requirement, holding that the “the term ‘control’ encompasses the power to promote the availability of fuels needed for proper operation of emission control devices.”¹⁵ The court reasoned that if unleaded gasoline were not conveniently available then the statutory intent of the Clean Air Act would be undermined because mandated emission controls would be damaged, resulting in the impairment of emission control devices.¹⁶ The *Amoco* court further noted that given the enormous “stakes” of damage to emission controls through misfueling, EPA “need not gamble” that the free market would supply sufficient quantities of unleaded gasoline.¹⁷

¹¹ See Exhibit B, Controls applicable to gasoline retailers and wholesale purchaser-consumers, 40 C.F.R. § 80.22 (1975)

¹² 38 Fed. Reg. 1254 (January 10, 1973)

¹³ 37 Fed. Reg. 3882 (February 23, 1972); 38 Fed. Reg. 1254 (January 10, 1973); 38 Fed. Reg. 28301 (October 12, 1973); 39 Fed. Reg. 16123 (May 7, 1974); 39 Fed. Reg. 43281 (December 12, 1974)

¹⁴ 56 Fed. Reg. 13767 (April 4, 1991)

¹⁵ See *Amoco v. EPA*, 501 F.2d 722, 744 (D.C. Cir. 1974)

¹⁶ *Id.*

¹⁷ *Id.* at 747

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Administrator
United States Environmental Protection Agency
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EPA similarly need not gamble that \leq E-10 fuel will continue to be provided by market forces. Just as E-0 has rapidly been eliminated from the market in the face of RFS mandates and blending economics, there is a discernable threat that \leq E-10 fuel will soon become similarly scarce. Because nonroad products and older model year motor vehicles constitute only a fraction of total fuel use, these products would not provide economic justification for the marketing of \leq E-10 fuel. Rulemakings such as the one requested by petitioners require substantial lead time, and EPA must act proactively now to prevent potential problems. If EPA waits until \leq E-10 fuels become scarce in the market, it will be too late to commence a rulemaking to mitigate the misfueling that will surely result. Accordingly, Petitioners urge EPA to expeditiously promulgate an affirmative marketing requirement for \leq E-10 fuels.

IV. Conclusion

Based on the foregoing, Petitioners respectfully request that EPA promulgate an affirmative marketing requirement pursuant to CAA Section 211(c) that guarantees the availability of \leq E-10 fuel at any retail gasoline station that offers $>$ E10 fuels.

* * *

We look forward to working with EPA on the development and expeditious promulgation of this requested rulemaking. Please contact Kris Kiser at OPEI at (703) 549-7601 or Bill Guerry at (202) 342-8858 with any questions or requests for additional information.

Respectfully Submitted,

American Motorcyclist Association
Association of Global Automakers
Association of Marina Industries
BoatUS
International Snowmobile Manufacturers Association
Motorcycle Industry Council

National Boating Federation
National Marine Manufacturers Association
Outdoor Power Equipment Institute
Personal Watercraft Industry Association
Recreational Off-Highway Vehicle Association
Specialty Vehicle Institute of America

cc: Gina McCarthy
Margo Oge
Karl Simon

USING E15 GASOLINE CAN CAUSE ENGINE FAILURE AND MAY VOID WARRANTIES

www.opei.org/EthanolWarning

A consumer warning from:



OUTDOOR POWER EQUIPMENT
INSTITUTE

A NEW RESTRICTED ETHANOL FUEL is coming to a gas station near you. This pump label may be your only **WARNING!**

ATTENTION

E15

Up to 15% ethanol

Use only in

- 2001 and newer passenger vehicles
- Flex-fuel vehicles

Don't use in other vehicles, boats or gasoline-powered equipment. It may cause damage and is **prohibited** by Federal law.





White Paper Series on the Renewable Fuel Standard

PMAA is a federation of 48 state and regional trade associations representing more than 8,000 mostly small business petroleum marketers nationwide. Petroleum marketers are engaged in the transport, storage and sale of petroleum products on both the wholesale and retail levels. These products include gasoline, diesel fuel, biofuel blends, kerosene, jet fuel, aviation gasoline, racing fuel, lubricating oils, home heating oil as well as **ethanol and biodiesel motor fuel blend stocks**. Among the customers served by petroleum marketers are motorists, retail gasoline stations, commercial transportation fleets, manufacturers, construction companies, federal, state and local governments, farmers, airports, railroads, marinas and homeowners. Small business petroleum marketers own and operate over 60 percent of all retail gasoline stations nationwide. **As a result, the majority of ethanol and biodiesel blends sold at retail pass through underground storage tank systems owned and operated by small business petroleum marketers.**

Currently, PMAA is neutral on the RFS, specifically, on decreasing the corn-based ethanol mandate. PMAA's Motor Fuels Committee and Board of Directors will be meeting in May 2013 where an official position on the corn-based ethanol mandate may emerge. Given that E-15 and E-85 cannot significantly increase ethanol consumption in the near term, many petroleum marketers have suggested that EPA lower the ethanol blend mandate for 2013 - 2014 to avoid chaos in the gasoline marketplace.

Below are the myriad concerns facing the petroleum marketing industry with respect to the RFS:

1. To what extent was the blend wall anticipated in the debate over the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007?

All stakeholders knew that the U.S. would eventually hit the RFS blend wall – the question was about timing and whether E85 would be the answer. In 2005, E15 wasn't considered as the solution to the blend wall. Furthermore, no one anticipated that gasoline consumption would fall dramatically after 2007 which has only moved the ethanol blend wall closer. Given that small business petroleum marketers own and operate approximately 60 percent of all retail gasoline stations nationwide, it's important that they be included in the RFS negotiations this spring and summer. Unfortunately, small business petroleum marketers were left out of the 2005 RFS negotiations between refiners and ethanol producers, and in 2007, no Congressional hearings were held on the 2007 RFS proposed ethanol production figures.

2. What are the benefits and risks of expanded use of E15 to automakers, other gasoline powered equipment makers, refiners, fuel retailers, and others involved in the manufacture and sale of gasoline and gasoline-using equipment?

*Currently, gasoline retail infrastructure equipment is certified to dispense and store up to 10 percent ethanol by Underwriters Laboratories (UL). Although UL has expressed "confidence" that most retailers can safely sell up to 15 percent ethanol blended gasoline, they have not actually "certified" existing dispensers, piping or underground storage tanks for such use. This is a major obstacle because several federal regulations, state laws, local ordinances and insurance policies require UL certified equipment. Retailers who decide to sell E15 could be held liable to pay for cleanup costs if a leak occurs due to the increased ethanol blends, and insurance companies may deny coverage. **During the decision to waive portions of the Clean Air Act to allow the use of E15, little consideration was given to the issue of compatibility with existing UST legacy equipment.** Statutory jurisdictional considerations notwithstanding, the fact remains that E15 will not be placed in widespread use in the short term until outstanding issues involving equipment compatibility are addressed.*

Furthermore, equipment manufacturers have yet to "approve" legacy equipment for E15 use. There is little incentive for equipment manufacturers to do so. First, it is unlikely manufacturers would assume the risk of liability for potential releases that would arise should legacy equipment be approved for E15 use. Second, by approving legacy equipment for E15 use, manufacturers would dry up a potentially lucrative market for newly manufactured compatible equipment. Nevertheless, PMAA believes the burden of compatibility determination for legacy equipment should reside with equipment manufacturers. Manufacturers are in the best position to identify equipment that requires compatibility approval as well as the materials they are made from and other important product specifications that are necessary for compatibility approval. However, even if equipment manufacturers were to certify legacy equipment, it stills lacks a UL stamp of approval. Federal OSHA

regulations require retailers to use equipment that has been listed by a “nationally recognized testing laboratory” as compatible with the fuel being stored. Secondly, tank insurance policies and bank loan covenants require retailers to be in compliance all applicable laws and regulations.

3. What are the risks of the introduction and sale of E15 to the owners of pre-2001 motor vehicles, boats, motorcycles, and other gasoline-powered equipment not approved to use it? Are there risks to owners of post-2001 vehicles? How do these risks compare to the benefits of the RFS?

Auto manufacturers extend warranties on existing vehicle fleets up to 10 percent ethanol. Most have not been willing to amend their warranties to handle blends above 10 percent because tests have shown E15 could damage engines, fuel pumps and other system components. This position did not change after EPA approved E15 for 2001 and newer vehicles. PMAA is also concerned that if an owner of a pre-2001 vehicle fills up his/her tank at an E15 gas station, that gas station could potentially be held liable. Even if E15 didn't cause the engine failure, the motorist could blame the retailer even if the retailer had labeled the E15 dispenser according to EPA's requirements. Retailers shouldn't be held liable for motorists who fail to read the labels on dispensers.

4. What is the likely impact, if any, of the blend wall on retail gasoline prices?

E15 may be “mandated by the market” as upstream suppliers struggle to meet escalating renewable fuel volume obligations under the agency's renewable fuel standard. Given equipment compatibility issues have not been solved, it could force a system wide retrofit of UST systems that would not only impose impossibly high compliance costs on retail marketers but could also disrupt supply and result in sharp price increases for gasoline at the pump.

5. What is the timing of the implementation challenges related to the blend wall? Will some entities face difficulties earlier than others?

Given that ethanol prices remain lower than the RBOB gasoline futures price, it may incentivize large retailers to buy E15 compatible equipment to gain a competitive advantage against a small retailer who would be unable to buy E15 compatible equipment to remain competitive in the retail marketplace. Of course, large retailers would still need to have liability protection from Congress and EPA before they would feel comfortable offering the fuel.

Furthermore, the cost to small business petroleum retailers for UST system retrofit would be enormous. PMAA estimates that the average cost to retrofit a retail gasoline station with E15 compliant equipment to be between \$375,000 and \$425,000 per site. Replacement of piping alone would cost at a minimum \$150,000. Such compliance costs would be staggering for retailers and would undoubtedly force many, particularly in those rural areas to close down. Those who could afford a system retrofit would be forced to pass the cost along to customers in the form of significantly higher gasoline prices.

6. Could the blend wall be delayed or prevented with increased use of E-85 in flexible fuel vehicles? What are the impediments to increased E-85 use? Are there policies that can overcome these impediments?

It's unlikely E85 would satisfy RFS corn-based ethanol blending requirements. E85 is still considered a niche market and many PMAA member companies have yet to offer E85 since there isn't enough E85 compatible vehicles on the road to make a modest return on investment. Furthermore, E85 must be priced lower than conventional gasoline for motorists to receive similar energy content at a competitive price given that ethanol has a lower BTU energy content compared to conventional gasoline.

Additionally, it's worth noting that existing E85 stations in the U.S. were permitted with a waiver from local Authorities having jurisdiction (AHJ) (local fire marshals). The waivers tell the retailer that local fire marshals won't enforce compatibility standards against them for selling E85. However, the waiver still doesn't satisfy OSHA requirements. To this date, very few E85 dispensers, hoses, nozzles, swivels, breakaways, shear valves, and submersible turbine pumps have been UL certified to handle E85. Both Gilbarco and Dresser Wayne have certified dispensers for E25.

7. Is E15 misfueling unavoidable? Are there lessons from the labeling and dispensing of diesel, E-85 and other fuels that prevent their misfueling that can also be applied to E15? What specific actions are companies taking to address potential misfueling concerns under MMPs?

See answer to question 8

8. Can blend wall implementation challenges be avoided without changes to the RFS? Is the existing EPA waiver process sufficient to address any concerns? If the RFS must be changed to avoid the blend wall, what should these changes entail? Should any changes include liability relief or additional consumer protections for addressing misfueling concerns?

PMAA believes the blend wall could be avoided to some extent with passage of the “Domestic Fuels Act of 2013” (H.R. 1214) introduced by Rep. Shimkus. The bill is designed to provide more legal and regulatory certainty to retailers wanting to sell EPA-approved fuels including E15. H.R. 1214 is similar to legislation introduced last Congress. The legislation would give the EPA Administrator the authority to issue guidelines to determine whether new and existing underground storage tanks and dispensing equipment are compatible with EPA-approved fuels.

The bill also provides misfueling protection for retailers who abide by EPA’s E15 labeling requirements. For instance, if a motorist ignores the labels and fuels a 2000 model year or older vehicle with E15, the retailer would not be held liable if he/she correctly has the E15 label in place. The legislation satisfies this concern, so that retailers can offer E15 with more confidence. Secondly, a retailer storing and dispensing E15 in equipment that satisfies EPA’s compatibility requirements will have additional confidence that the infrastructure will perform satisfactorily. Senate legislation hasn’t been introduced this Congress, but is expected later this year. Until H.R. 1214 is signed into law, PMAA believes E15 sales will be minimal due to the potential legal and regulatory consequences.

9. Have the 2017 and Later Model Years Light Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy standards for cars and light trucks changed the implementation outlook of the RFS?

Vehicle manufacturers are in the best position to answer this question.

10. What other methods, including the use of drop-in fuels, are available to industry to ease the challenge posed by the blend wall?

Advanced biofuel producers are in the best position to answer this question.

11. What are the impacts on renewable fuel producers if the RFS is changed to avoid the blend wall?

Renewable fuel producers are in the best position to answer this question.

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